U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33358714

Date: AUG. 30, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner is an online marketplace for images, music, and other editing tools. It seeks to classify the Beneficiary as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the record did not establish that the Beneficiary had a major, internationally recognized award, nor did the Petitioner demonstrate that the foreign national met at least three of the ten regulatory criteria. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) of the Act. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-step analysis. In the first step, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then move to the second step to consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (discussing a two-step review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). Before the Director, the Petitioner claimed the Beneficiary met the following five categories:

- Published material;
- Contributions of major significance;
- Authorship of scholarly articles;
- Performance in a leading or critical role for distinguished entities; and
- High salary or remuneration.

The Director decided that the Beneficiary met one of the evidentiary criteria relating to authorship of scholarly articles, but that he had not satisfied the remaining categories listed above. On appeal, the Petitioner maintains the evidence satisfies the evidentiary criteria relating to each of the areas upon which the Director issued an adverse determination. After reviewing all the evidence in the record, we agree with the Director that the Petitioner has satisfied the scholarly articles criterion, but we do not agree with the Director's assessments relating to a leading or critical role or the high salary criteria.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.* 8 C.F.R. § 204.5(h)(3)(vi).

The Petitioner provided evidence showing the Beneficiary published scholarly work in his field in at least three of the require publication types. The Director determined this evidence met this criterion's requirement and we agree with that conclusion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

This criterion contains multiple evidentiary requirements the Petitioner must satisfy. First, the published material must be about the Petitioner and the contents must relate to the Petitioner's work in the field under which they seek classification as an immigrant. The published material must also appear in professional or major trade publications or other major media. Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the Petitioner must establish the circulation statistics are high relative to other similar forms of media. The final requirement is that the Petitioner provide each published item's title, date, and author and if the published item is in a foreign language, they must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3). The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The Petitioner provided other scholarly articles citing to the Beneficiary's work and patents as evidence under this criterion, as well as his own citations. The Director determined that the Petitioner did not meet the requirements of this criterion as the material was not about the Beneficiary and his specific work published in professional or major trade publications or other major media. Regarding the Beneficiary's own citations, the Director indicated this evidence bore no probative value because it was not related to this criterion's requirements.

On appeal, the brief notes that USCIS policy provides that the Beneficiary and his work "need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the person's work in the field and mentions the person in connection to the work may be considered material about the person relating to the person's work." *See generally* 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policymanual.

They also point out agency policy confirms that its "officers may consider material that focuses solely or primarily on work or research being undertaken by a team of which the person is a member, provided that the material mentions the person in connection with the work or other evidence in the record documents the person's significant role in the work or research." *Id.* And finally, they note agency policy further reflects that evidence under this criterion "may include documentation such as print or online newspaper or magazine articles, popular or academic journal articles, books, textbooks, similar publications, or a transcript of professional or major audio or video coverage of the person and the person's work." *Id.*

While we acknowledge counsel's efforts here, they invite us to expand the regulatory language—as well as agency policy describing how we are to apply those rules—beyond its textual confines, similar to stretching a garment until the fabric loses its intended form. We must resist such elasticity where it threatens to compromise the integrity of this administrative law. We note the Petitioner does not argue that these scholarly works include a substantial discussion of the Beneficiary and his work as opposed to simply referencing to it. More appropriate evidence under this criterion would consist of material that is actually about the Beneficiary instead of being about software networking, cloud computing, and other information technology topics.

Coverage that is about a broader topic in which the foreign national is merely mentioned does not demonstrate that the published material itself is "about the alien" and "relating to the alien's work in the field" as the regulation mandates. *See Mussarova v. Garland*, 562 F. Supp. 3d 837, 848–49 (C.D.

Cal. 2022) (finding the published material criterion's requirements are not satisfied where the articles are about events in which a foreign national completed but were not about them and citing *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 545 (S.D.N.Y. 2012)); *see also generally Negro-Plumpe v. Okin*, No. 2:07-CV-820-ECR-RJJ, 2008 WL 10697512, at *3 (D. Nev. Sept. 9, 2008) (upholding a finding that articles about a show or a character within a show are not about the performer).

Because the Petitioner did not provide evidence of published material that is about the Beneficiary in the requisite publication types, it has not fulfilled this criterion's plain language requirements.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

The Petitioner provided numerous forms of evidence, but the Director determined that material did not meet the requirements of this criterion.

We begin with the Petitioner's claims of error on the Director's part. We agree with the Petitioner that the Director committed an error when they required evidence to "directly compare the beneficiary's remuneration to those in his specific position of Senior Software Engineer, API in the specific field of enterprise-level solutions and network security development."

The Petitioner must present evidence of objective earnings data showing the Beneficiary has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work during the same time period. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713–14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field). But narrowly focusing on the job's title rather than its duties and responsibilities is not the proper approach.

Now to the evidence. Although the Petitioner provided several types of evidence, we note a few that appear to demonstrate they satisfy this criterion's requirements. The Petitioner provided material from the now defunct U.S. Department of Labor's Online Wage Library for the standard occupational classificational code 15-1252 for Software Developers in the location and the year they filed the petition, and the same year as his representative pay statements. The Online Wage Library reflects a Level 4 Wage was $157,477 per year. A Level 4 Wage is the average of the highest-paid two-thirds, or approximately the 67th percentile. The Beneficiary's annual salary is above the 89th percentile and we conclude this is sufficient to meet this criterion's requirements.

We therefore withdraw the Director's adverse determination and conclude the Petitioner has submitted evidence that meets the plain language requirements of this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

A leading role should be apparent by its position in the overall organizational hierarchy and the role's matching duties. A critical role should be apparent from the Petitioner's impact on the entity's activities. The Petitioner's performance in any role should establish whether it was leading or critical

for organizations, establishments, divisions, or departments *as a whole*. Ultimately, the leading or the critical role must be performed on behalf of the organization, establishment, division, or department that enjoys a distinguished reputation, rather than for a unit subordinate to these listed entities. *See generally* 6 *USCIS Policy Manual*, *supra*, F.2(B)(1).

USCIS policy reflects that organizations, establishments, divisions, or departments that enjoy a distinguished reputation are "marked by eminence, distinction, or excellence." *Id.* (citing to the definition of *distinguished*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/distinguished). The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The Petitioner provided claims relating to three organizations but the Director decided none of those claims met this criterion's requirements. In a letter from [redacted] current Senior Vice President of [redacted] she characterized the Beneficiary's role at [redacted] as both leading and critical. But it does not appear that his role was leading in the manner the regulation requires for this criterion and we will consider whether his performance for this organization was critical.

Ms. [redacted] stated [redacted] hired the Beneficiary late in 2018 as a software engineer but based on his skills moved him to the ad-products team early the next year. She stated the Beneficiary built [redacted] ad-pacing services, which are tools or technologies used to regulate the delivery of online advertisements over a specified time period to ensure ads are distributed evenly throughout an advertising campaign's duration. These services were particularly important for [redacted] business as they can experience spikes in use surrounding large, planned events (e.g., the Superbowl) or unplanned events (e.g., celebrity gossip).

Ms. [redacted] detailed how [redacted] advertising services impacted [redacted] which ultimately fell through due to [redacted] Ms. [redacted] quoted and referred to an article published on TechCrunch's website in which the article's author quoted from the [redacted] primary regulatory body responsible for overseeing and enforcing competition law and ensuring that markets operate fairly:

> "Before the merger, [redacted] had launched innovative advertising services which it was considering expanding to countries outside the U.S., [redacted] services allowed companies—such as Dunkin' Donuts and Pepsi—to promote their brands through [redacted] noted.
>
> [redacted] advertising services had the potential to compete with [redacted] They would have also encouraged greater innovation from others in the market, including social media sites and advertisers. [redacted] terminated [redacted] advertising services [redacted] removing an important source of potential competition. [redacted] considers this particularly concerning given that [redacted] controls nearly half of the [redacted]

It appears Ms. [redacted] explains not only how the Beneficiary's work for the company had an internal impact, but also in its business dealings outside of the organization. She further explains the Beneficiary's other efforts within the organization, but based on his work on the ad-pacing services she has sufficiently explained how his work for the company was impactful. She details how the company has progressed in the area in which the Beneficiary was a key player and it seems apparent that his role was crucial to [redacted] success. As it relates to [redacted] reputation, the record more than adequately reflects it meets the regulatory requirement of being distinguished.

Based on the above, we withdraw the Director's conclusion that the Beneficiary did not meet this criterion's requirements.

Because the Petitioner has fulfilled at least three of the regulatory criteria, it is unnecessary that we offer additional analysis on the remaining claims under the regulation at 8 C.F.R. § 204.5(h)(3)(i)–(x). It would also serve no purpose for us to evaluate the Petitioner's comparable evidence claims for the same reason. *See* 8 C.F.R. § 204.5(h)(4).

III. CONCLUSION

Further, because the Petitioner has overcome the only stated ground for the denial, we remand this proceeding so that the Director can render a final merits determination in keeping with the *Kazarian* framework.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.